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No. 94-2127

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

HAROLD W. GEORGE, BARRY SKOKOWSKI, SR., and MELVIN R. PRIMAS, individually and in their official capacities,

Petitioners,

v.

JOSEPH CASALE and WILLIAM EDMUNDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. When the District Court's holding that the Respondents were terminated from their positions of public employment based upon the Respondents' lack of political affiliation and in order to make room for politically-connected employees is entirely consistent with this Court's holdings in *Elrod v. Burns*, *Branti v. Finkel* and *Rutan v. Republican Party of Illinois*, should this Court grant Petitioners' Writ of Certiorari?

2. Should this Court grant a Writ of Certiorari to review a determination that Petitioners were not entitled to qualified immunity pursuant to *Harlow v. Fitzgerald* when the constitutional violation for which the Petitioners were held responsible, the termination of the Respondents' public employment based upon their lack of political affiliation and to make room for politically-connected individuals, was in fact well established in *Elrod* and *Branti* for well over a decade?

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On Petition For Writ Of Certiorari
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BRIEF IN OPPOSITION

RESPONDENTS JOSEPH CASALE AND WILLIAM EDMUNDS RESPECTFULLY SUBMIT THAT PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT BE DENIED

COUNTER-STATEMENT OF OPINIONS BELOW

The Petitioners' statement of the opinions below is correct insofar as it is presented. However, the Respondents would also like to call to the Court's attention the fact that in the jury questionnaire, the jury was specifically asked with

regard to each individual Petitioner's actions towards each individual Respondent:

> Did [Respondent] prove by a preponderance of the evidence that politics . . . was a substantial or motivating factor in the decision of [Petitioner] to remove him from his employment?

In answer to each question, the jury responded:

> Yes.

The jury was also asked with regard to each Petitioner and Respondent:

> Did the [Petitioner] prove by a preponderance of the evidence that he would have removed [Respondent] from his employment in the absence of political considerations?

In each case, the jury's answer was:

> No.

This makes it crystal clear that the finder of fact, the jury, found that each of the individual Petitioners was involved in the termination of the employment of each individual Respondent for political reasons: in this case, lack of involvement in the political process.

JURISDICTION

Petitioners' jurisdictional statement is complete and correct.

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioners' statement of constitutional provisions and statutes is complete and correct.

COUNTER-STATEMENT OF THE CASE

This matter, from its inception as a complaint filed in the United States District Court for the District of New Jersey, has involved no novel questions, or unique and unusual interpretations, of the law. Rather, Respondents have at all times asserted a well established principal of constitutional law: that as non-policy-making employees of the State of New Jersey, it was a violation of their First Amendment rights to be removed from their positions of employment based upon their lack of political affiliation and/or lack of involvement in the political process, in order to make room on the payroll for politically connected individuals.

The Respondents, Joseph Casale and William Edmunds, were employed, respectively, as Supervisor of Investigations and Assistant Supervisor of Investigations in the Office of Ombudsman for the Institutionalized Elderly. Pursuant to New Jersey Statute, the Ombudsman's Office was "in but not of" the New Jersey Department of Community Affairs. This meant that while the Department of Community Affairs had certain responsibilities with regard to the Ombudsman's Office, including finances and certain paperwork associated with the fiscal and employment policies of the Ombudsman's Office, only the Ombudsman pursuant to New Jersey

Statute had the authority to hire or fire employees of the Ombudsman's Office.

Through September 1, 1990, the Respondent worked for Ombudsman William R. Abrams. As of September 1, Abrams was replaced as Ombudsman by Petitioner Harold W. George.

This matter involves questions of interpretation of facts which were presented at the trial in this matter. The Petitioners' presentation of facts represents neither an overview of all facts presented at the trial, nor, as should be set forth in Petitioners' Writ, a view of the facts which could reasonably have been reached by the jury favorable to the Respondents.

Thus, Petitioners allege that Respondents were only two of numerous personnel that Petitioners Barry Skokowski, Assistant Commissioner of the Department of Community Affairs, and Melvin Primas, Commissioner of the Department, discussed terminating in their meetings with William Abrams, then Ombudsman and allege that Abrams refused to participate in statewide and department wide budgetary savings through reductions of middle managers. Testimony at trial showed that Abrams was not directed to reduce the staff, he was specifically directed to remove the Respondents from their positions. Not only did Abrams testify that both Primas and Skokowski specifically directed him to terminate Casale and Edmunds, Respondent Skokowski specifically confirmed that he had selected Casale and Edmunds for termination. Skokowski further confirmed that Abrams told Skokowski that if there were layoffs, he wanted to be

the one who made the decision as to whom to lay off, and that Skokowski denied Abrams that discretion.

The Petitioners' allegation that Abrams was terminated as the Ombudsman based on his refusal to terminate employees and to otherwise cooperate with the Administration's efforts to reduce the level of expenditures in State government is untrue; in fact, Abrams was specifically told by Petitioner Skokowski that he would be fired if he refused to fire the Respondents.

That the Respondents Casale and Edmunds were specifically targeted for termination was confirmed by Abrams in a letter to Petitioner Primas dated July 26, 1990 requesting:

> . . . that the Administration reconsider its decision to terminate Joseph Casale, Supervisor of Investigations and William Edmunds, Assistant Supervisor of Investigations, after I leave office.

The sole response received by Abrams was a letter thanking Abrams for his service as Ombudsman. Primas at no time responded stating that Abrams had never been directed to terminate the services of the Respondents Casale and Edmunds.

The Petitioners further err in stating there was no evidence that the new hires in the Ombudsman's Office, Elaine Mahoney, Tom Brown and William Macchi, were hired for reasons of political participation or affiliation. It is true that, as is frequently the case in any discrimination situation, the motivations of the Petitioners were never absolutely and positively articulated. Rather, the jury was able to draw the conclusion that such hirings had political motivations based upon a review of known facts

concerning Mahoney, Brown and Macchi, together with a review of the testimony of the Petitioners with regard to the purported reasons which they set forth for the hiring of Brown, Mahoney and Macchi, as well as the purported reasons for the termination of Respondents. Among the facts presented from which the jury could reasonably have concluded that the reasons for the hiring of Macchi, Mahoney and Brown were based upon their political participation and/or affiliation, and that the reason for the termination of the Respondents was specifically to make room for these individuals are the following:

1. Petitioner Primas' political affiliations are clear. Primas had a long time affiliation with the Democratic party: he served as a member of the City Council of Camden for eight years, was Mayor of Camden for eight and a half years and he was appointed by Democratic Governor Jim Florio, whom he had known since 1973, to be one of nineteen or twenty members of the Governor's cabinet, the Commissioner of the Department of Community Affairs. Primas had known Tom Brown for over fifteen years and was instrumental in hiring Brown. However, he did not know what job Brown was hired to do.

2. Mahoney's participation in the political process is undisputed. She had worked in the Governor's Office in Washington, D.C. and on legislation and lobbying before the New Jersey Legislature.

3. Macchi had been Director of Aging in Hudson County at the time he was hired in the Ombudsmans Office. Although Petitioner Skokowski claimed he was unaware of Macchi having any political connections, he subsequently testified "that major jobs in Hudson County

traditionally until recently have been from political connections" and that at the time of the trial, Macchi was working for the Whitman campaign.

4. Although Petitioners Primas and Skokowski offered a number of reasons for the hiring of Macchi, Mahoney and Brown, the jury clearly chose not to believe this testimony, given that:

(a). The job duties for which Mahoney, Macchi and Brown were hired were so unclear that Abrams, the Ombudsman, at the time Mahoney, Macchi and Brown were hired, was given no information as to their job duties and salaries from the individuals who hired them, Petitioners Primas and Skokowski, other than their starting dates. Primas, who made the determination to hire Brown, made no decision as to what his job title or job duties would be. In fact, when Harold George, the new Ombudsman, came to work, he was unable to ascertain Macchi or Mahoney's job titles or job duties, nor was he able to ascertain Brown's job title.

(b). Although Petitioners Skokowski and Primas claimed that Brown, Mahoney and Macchi were hired to perform essential functions in the Ombudsman's Office, neither of the two ever notified the incumbent Ombudsman Abrams as to the alleged deficiencies that needed to be corrected.

(c). Statutorily, only the Ombudsman has the power to hire and fire employees in the Ombudsman's Office. Brown, Mahoney and Macchi were the only three employees who appeared on the payroll during Abrams' term as Ombudsman with no input from Abrams and they were the only three employees in the Ombudsman's

Office who were ever directly hired by Primas or Skokowski.

(d). At the time Macchi, Mahoney and Brown were hired, there was a hiring freeze throughout State government which had gone into effect in 1989 during the Kean administration and continued until after the terminations of the Respondents, as well as an attempt to eliminate middle management positions. Nonetheless, during the hiring freeze, Macchi, Mahoney and Brown were hired into middle management positions.

(e). Although Petitioners Primas and Skokowski claimed that it was incredibly painful to have to layoff long time middle managers from the Department of Community Affairs due to the budgetary crisis, they looked only to Mahoney, Macchi and Brown, three employees whose resumes came from the Governor's Office, to fulfill the alleged need in the Ombudsman's Office and did not look to individuals being laid off from Community Affairs to see if any of those individuals had the necessary qualifications to fulfill the alleged needs in the Ombudsman's Office.

5. Although Petitioner George, who did the actual termination of Respondents, claimed the termination was based on an independent assessment of the needs of the Ombudsman's Office and without any knowledge that Petitioners Primas and Skokowski had previously directed the termination of these two individuals, the jury could easily have concluded that this was false in light of the facts that:

(a) Due to the fact that Respondent Casale was out sick at the time that petitioner George came to work

as the Ombudsman, he had never met with Casale nor spoken to him on the telephone at the time that he reached the decision to terminate him.

(b) Although Petitioner George had spoken to Respondent Edmunds at the time he made the decision to terminate him, he could not refute testimony that the discussion consisted solely of saying hello or otherwise greeting each other.

(c) Although Petitioner George when he worked as a Deputy Attorney General had been impressed by the quality of work done in the Ombudsman's Office, he made no effort to find out if anyone remaining at the Office was responsible for that work.

(d) Petitioner George never reviewed Respondents Edmunds' or Casale's personnel files prior to making the decision to terminate their employment.

(e) Petitioner George made no attempt to discover if the Respondents had any information or contracts which could be helpful to the Office.

(f) Petitioner George relied, according to himself, only on the recent political hirees, Mahoney and Brown, for his information as to how the Office functioned based upon which he determined to terminate the employment of Casale and Edmunds.

Respondents have never argued that this is a case in which the facts are not subject to interpretation. Petitioners' entire legal argument in this matter is based on the Petitioners' interpretation of the facts and an

unwillingness to live with the fact that the jury found the facts favorable to the Respondents.

REASONS FOR DENYING THE WRIT – SUMMARY OF ARGUMENT

Petitioners in this matter argue that certiorari should be granted by this Court because the Court below allegedly created, extended or changed the existing law concerning the impact of the First Amendment on termination from public employment for reasons of political affiliation or the lack thereof. The Petitioners reached this conclusion by setting forth a version of the facts which was advanced by Petitioners in front of the jury, before the District Court Judge in their request for a new trial and before the Third Circuit in their appeal of the determination of the District Court. However, the facts as found by the jury, and the District Court, and as upheld by the Third Circuit, require no extension of, change of or even reinterpretation of existing case law as it interprets the application of the First Amendment to the rights of non-policymaking public employees.

This court has made it clear for many years in its decisions in *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) that the First Amendment to the United States Constitution guarantees non-policy making public employees the right to participate in or not participate in the political process, and further that the right to participate in or not participate in the political process extends beyond the rights of employees to participate in

or with political parties, or to refrain from such activity. There is thus no special or important reason for the Court to grant certiorari in this matter, solely to revisit issues which it has reiterated time and time again.

As the principles applied by the District Court and the Court of Appeals were the principles enunciated by this Court in *Elrod, Branti* and *Rutan*, there was no extension of clearly established statutory or constitutional rights which would, pursuant to this Court's determination in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), grant to the Petitioners qualified immunity.

For this Court to find novel or unusual legal issues to address, it would first have to revisit and reinterpret the facts contrary to the factual findings made by the jury and the District Court. It is therefore requested that this Court deny the Petitioners' application for a Writ.

A. PETITIONERS FAIL TO PRESENT A SPECIAL OR IMPORTANT ISSUE BECAUSE THE COURTS BELOW DID NOT EXTEND OF CHANGE THIS COURT'S HOLDINGS IN *ELROD, BRANTI* AND *RUTAN*

The guarantee of the First Amendment to the United States Constitution that public employees (with the exception of certain policy-making employees not relevant herein) have the right to participate in or not participate in the political process extends beyond the rights of employees to participate in or with political parties, or to refrain from such activity. This right extends to taking part in or not taking part in the political process altogether, as determined by this Court in *Elrod v. Burns*, 427

U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

This Court stated in *Elrod, supra*

> Non-policy making individuals usually have only limited responsibility and are therefore not in a position to support the goals of the in party . . . It is the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests . . . *Elrod* at 367-368.

In *Elrod*, employees of the Sheriff's Office of Cook County, Illinois alleged that they were being threatened with discharge solely because they were not affiliated with or sponsored by the Democratic Party. This Court agreed, holding that the practice of patronage violates the First and Fourteenth Amendments because it severely restricts political beliefs and association. *Elrod* at 355.

In *Branti*, this Court held that continued employment of assistant public defenders could not be contingent upon allegiance to a particular political party. In *Rutan, supra*, this Court again ruled that it was an infringement of First Amendment rights to base hiring and promotion decisions on political affiliation and support.

The Third Circuit in *Bennis v. Gable*, 823 F.2d 723 (3rd Cir. 1987), held that the right not to participate and/or not to associate includes the right not to be removed from employment solely for the purpose of making room on the payroll for those who have exercised the right to participate and/or associate. In *Bennis*, the Court stated:

> The problem with this assertion . . . is that an alternative view of the demotion to make positions available for political supporters is that the demotion thus reflects a failure to support. A citizen's right not to support a candidate is every bit as protected as his right to support one. *Bennis* at 731.

In his decision of November 4, 1993, the Honorable Harold A. Ackerman found that appellees' claim in this case "that they were dismissed because they were insufficiently active in politics, and in order to make room for politically connected individuals fall within the protection of the First Amendment." (7a).

Contrary to Petitioners' assertions that there was no proof that lack of political involvement caused Respondents' terminations, Judge Ackerman found that as Respondents had sufficiently proven that their dismissals stemmed from the desire to make room for politically connected individuals, the verdict would survive a judgment notwithstanding the verdict. He found the jury properly concluded that the appellees were removed based upon their lack of participation in the political process. The testimony of the two appellees, their chief witness, and the contradictions and inconsistencies in the testimony of the appellants supported that point.

The various cases in the Circuits that Petitioners contend support their claim that the within matter represented an extension or change in existing law in fact support the findings of the jury and the Court. *Laskaris v. Thornburg*, 733 F.2d 260 (3rd Cir. 1984), *cert. denied* 469 U.S. 886 (1984), *Savage v. Gorski*, 850 F.2d 64 (2nd Cir. 1988), *Correa v. Fischer*, 982 F.2d 931 (5th Cir. 1993),

Endicott v. Huddleston, 644 F.2d 1208 (7th Cir. 1980), *McMillian v. Svetanoff*, 878 F.2d 186 (7th Cir. 1987) and *Erickson v. Pierce County*, 950 F.2d 801 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 815 (1992) all stand for the position undisputed by the Respondents, the District Court and the Third Circuit in this matter that the Respondents had the burden of proving that their termination was the result of their involvement or lack of involvement in the political process. The Respondents satisfied that burden in the eyes of the jury, the District Court Judge and the Third Circuit (and have only failed to satisfy that burden in the eyes of Petitioners, when viewing the facts solely from the point of view of Petitioners).

Under the aforementioned case law, Respondents were required to show that their activities or non-activities were substantial or motivating factors in the Appellants' decision to dismiss them. This requirement was satisfied. Judge Ackerman stated that in order to meet this requirement:

> Defendants must have had knowledge either that the plaintiffs exercised their rights not to be involved in the political process or political parties, or that defendants were being dismissed in order to make room for individuals with political connections. In such cases, of course, there will rarely be direct evidence of the requisite knowledge on the part of the defendants. Rather, such knowledge must ordinarily be inferred from all the facts and circumstances. In this case, viewing all the evidence introduced by both parties in the light most favorable to the plaintiffs and giving plaintiffs the advantage of every fair and reasonable inference, I find that there was sufficient evidence from which a jury

> could reasonably find for the plaintiffs on their First Amendment claims. (7a-8a).

The evidence presented to the jury overwhelmingly supported Respondents' position.

It was well within the role of the jury to disregard the credibility of the Petitioners and credit the testimony of the Respondents and their chief witness, William Abrams. The jury, given the totality of facts presented, and given the right of the jury to make credibility determination and draw inferences from the fact, drew the conclusions which led to the verdict as set forth by the jury in the interrogatories, a verdict completely consistent with the law as stated in *Elrod, Branti* and *Rutan.*

B. AS THIS MATTER DID NOT INVOLVE A CHANGE IN OR EXTENSION OF THE PRINCIPLES ENUNCIATED IN *ELROD, BRANTI* AND *RUTAN,* THE PETITIONERS WERE NOT ENTITLED TO QUALIFIED IMMUNITY

In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), this Court set forth the standard to be imposed in determining whether or not government officials are entitled to qualified immunity. In *Harlow,* the Supreme Court held:

> . . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known . . .
>
> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether the law was clearly established at the time an action occurred . . . if the

> law was clearly established, immunity defense ordinarily should fail, since a reasonable confident public official should know the law governing his conduct. *Harlow* at 818-819.

Elrod was decided in 1980; *Branti* was decided in 1980; and *Bennis v. Gable*, 823 F.2d 723 (3rd Cir. 1987), which clarified that the First Amendment rights enunciated in *Elrod* and *Branti* included the right not to be removed to make room for political supporters, was decided in 1987. All of those cases established the right of a person to not be discharged from public employment based on lack of political affiliation with a political party. As Judge Ackerman stated:

> Although *Bennis* is not factually identical to this case, one of the Plaintiff's arguments in that case was that the reason for the dismissal was simply to make room for politically affiliated persons. I, therefore, find that as of 1987, the law was clearly established that a government official may not dismiss an employee on the ground that the employee lacks political affiliation or in order to make room for politically-connected employees (9a).

Respondents have fully set forth in Section A of their Argument the reasons why this matter involves no change in or extension of existing law. Petitioners not only could have known but should have known that they were violating Respondents' First Amendment rights. They are not entitled to qualified immunity under *Harlow*. Petitioners' claims to the contrary should be dismissed.

CONCLUSION

Petitioners have set forth no special or important reason for their Writ of Certiorari to be granted. That Writ should be denied, as the facts as found by the jury and the District Court required only the application of existing law, without extensions, modification or change.

The Petitioners are only able to set forth reasons for this Court to consider their Writ for Certiorari based on alleging facts not as found by the jury and the District Court, but as the Petitioners wish the facts to have been found. Dissatisfaction with factual findings at the District Court level does not present a special or important reason for this Court to grant Certiorari and it is respectfully requested that the Petitioners' request for Writ of Certiorari should be denied.

Respectfully submitted,

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